BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CARLA J. ALGER-COMBES	)	
Claimant	)	
VS.	)	
	)	Docket No. 159,586
IBP, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals from an August 30, 1996, Award entered by Special Administrative Law Judge Douglas F. Martin. Oral argument was made to the Appeals Board on February 20, 1997. Appeals Board member Gary M. Korte has recused himself from this proceeding and Jeff K. Cooper has been appointed Appeals Board member pro tem to serve in his place.

APPEARANCES

Claimant appeared by her attorney, John J. Bryan of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Tina M. Sabag of Dakota City, Nebraska.

RECORD

The record considered by the Appeals Board is enumerated in the Award by the Special Administrative Law Judge.

STIPULATIONS

The stipulations by the parties are adopted by the Appeals Board for this review as listed in the Award by the Special Administrative Law Judge with the amendment to stipulation No. 8 to reflect the parties' agreement announced during oral argument that temporary total disability compensation was paid for 21.86 weeks at the rate of $204.88 per week. This represents

payment for the period of December 30, 1992, through January 25, 1993, and from July 28, 1993, through November 30, 1993. Claimant does not claim or allege any additional period of temporary total disability.

ISSUES

Claimant, in her Petition for Review, raised the following issues:

"All issues determined adverse to claimant, including without limitation: date of accident, vocational rehabilitation, amount of TTD paid, amount of TTD due, and nature and extent of injury."

Claimant's Memorandum brief to the Appeals Board listed the issues as follows:

"1. What is the date of accident for purposes of determining the applicable law?

2. What is the nature and extent of the injury with regard to work disability?

3. Is Claimant entitled to vocational rehabilitation?

4. What amount of TTD has been paid? Remains payable?"

Respondent's Brief to Board of Review describes the issues as follows:

"A. Nature and extent of disability and compensation due.

B. Unauthorized medical treatment.

C. Future medical treatment.

D. Vocational rehabilitation.

E. Average weekly wage."

Accordingly, all of the issues listed by the Special Administrative Law Judge in his August 30, 1996, Award have been raised by the parties as issues for Appeals Board review. In addition, a new issue has been raised for the first time on appeal concerning date of accident. This was not listed by the Special Administrative Law Judge as an issue in the Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of counsel, the Appeals Board finds that the Award entered by the Special Administrative Law Judge should be modified.

(1) Date of accident. The Special Administrative Law Judge treated this case as a claim for work disability under the "new act." That is, he assumed that the accident date was alleged

as a series continuing through to the last day claimant worked for respondent. As claimant's last day worked was after July 1, 1993, the Special Administrative Law Judge applied the amendments to the Workers Compensation Act which became effective on that date.

Date of accident, and consequently what law applies to this case, was not an issue before the Special Administrative Law Judge. This is evidenced by the fact that date of accident was not listed as an issue in the Award. Also, the "Stipulations" set forth in the Award included the stipulation that respondent admits that claimant met with personal injury by accident on the dates alleged. The form E-1 Application for Hearing filed October 22, 1991, alleged an accident date of "late January, 1991, to present." An amended Form E-3 Application for Preliminary Hearing changing the date of accident was filed July 31, 1992, and alleged a "series from 1/91 to 10/91."

The confusion concerning date of accident apparently comes from the announcement by the Administrative Law Judge at the regular hearing concerning the stipulations and the fact that the Special Administrative Law Judge who decided this case was not the same Judge that presided over the regular hearing. Beginning on page 4 and continuing onto page 5 of the transcript of the June 23, 1995, regular hearing, Administrative Law Judge Floyd V. Palmer stated as follows:

> "All right, this matter comes on today, as I said, for a regular hearing. We previously had a pre-hearing settlement conference in this case. I'll read the result of that conference into the record and then ask the parties to make any necessary additions or corrections. This accident occurred here in Lyon County, Kansas. It's alleged as a series from January of 1991 through October of 1991 and the last day of work being November 1st, 1993. This is related to bilateral carpal tunnel syndrome and the right and left shoulder[s]. Respondent admits claimant met with personal injury by accident on or about the date alleged. Respondent admits the alleged accidental injury arose out of and in the course of employment. Respondent admits notice. Respondent admits relationship of employer and workman. Respondent admits coverage by the Act. Respondent admits timely written claim. The respondent was self-insured at all material times. Once again, we do not have an agreement on average weekly wage. Temporary total has been paid for 24.08 weeks at the rate of $204.88 in the total amount of $4,934.39."

It appears that because Judge Palmer stated accident was "alleged as a series from January of 1991 through October of 1991" and then added in that same sentence "and the last day of work being November 1st, 1993" that the Special Administrative Law Judge took this statement to mean that date of accident was alleged as a series continuing through to the last day of work. However, it is clear from a review of the entire file that the parties never intended date of accident to be an issue, never argued for a different accident date from that which was alleged in the amended Application for Preliminary Hearing and, furthermore, always litigated this case as a claim for work disability under the "old act" definition of work disability pursuant to K.S.A. 1991 Supp. 44-510e. This is further evidenced by the fact that neither the October 20, 1995, submission letter to Judge Palmer by counsel for claimant nor the February 27, 1996, submission letter to Judge Palmer by counsel for respondent showed date of accident to be at issue. Respondent's submission letter contained the following stipulation:

> "Respondent admits the claimant met with personal injury by accident on the date alleged."

Respondent's submission letter goes on to argue nature and extent of disability using the "old act," two-part test for work disability which involved a determination of "the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced . . . ." K.S.A. 1991 Supp. 44-510e(a). Furthermore, at regular hearing, in claimant's submission letter, in respondent's submission letter, and in claimant's supplemental submission letter of June 28, 1996, the issue of claimant's entitlement to vocational rehabilitation benefits was raised and discussed. This would not have been an issue had the parties understood this to be a "new act" case. Respondent's submission letter does not even mention the July 1, 1993, amendments to the Workers Compensation Act which removed from the Act the provisions for mandatory vocational rehabilitation and the administrative law judge's authority to order such benefits.

Based upon our review of the record, the Appeals Board finds claimant alleged she suffered personal injury by accident from a series of mini-traumas beginning January 1991 and ending October 1991. The parties stipulated to the dates of accident as alleged. The Appeals Board finds the stipulation of the parties was to a series of accidents ending in October of 1991. Accordingly, this case will be decided as an "old act" claim.

(2) Nature and extent of disability. The parties stipulated to a 20 percent permanent partial impairment of function to the body as a whole. The issue is whether claimant is entitled to a work disability in excess of her percentage of functional impairment. Claimant presented the testimony of vocational expert Mr. Bud Langston. Respondent did not present any expert vocational testimony. To this extent, the opinions of Mr. Langston concerning claimant's loss of access to the open labor market and loss of ability to earn a comparable wage are uncontroverted. Evidence presented in a workers compensation case that is uncontradicted and not improbable, unreasonable, or shown to be untrustworthy cannot be disregarded by the fact finder. Uncontradicted evidence should generally be regarded as conclusive. *See* Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

Mr. Langston testified that claimant's ability to access the open labor market has been reduced by 75 to 80 percent as a result of her work-related injuries and the resulting restrictions. He further testified that her ability to earn wages in the open labor market would be limited to approximately $5 per hour. Comparing a post-injury, wage-earning ability of $200 per week to claimant's average weekly wage at the time of her injury of $360.35 results in a loss of 44.5 percent.

Respondent now objects to Mr. Langston's opinions because they were based in part upon restrictions recommended by physicians who did not testify in this case. However, although Mr. Langston considered the restrictions of several physicians, he also testified that his percentage opinions reflecting the claimant's loss of ability to access the open labor market and earn a comparable wage were the same utilizing only the restrictions of Dr. Edward J. Prostic and Dr. Dale E. Darnell. Dr. Prostic did testify in this case and, to the extent his restrictions differed from Dr. Darnell's, it does not appear that they would have significantly altered Mr. Langston's opinion. Respondent points in particular to the opinion of

Dr. Darnell concerning overhead lifting as being significant to Mr. Langston's conclusions. However, in his May 16, 1996, report which is attached as Exhibit No. 2 to the deposition, Dr. Prostic likewise recommends claimant not return to work that is done at or above shoulder height. Furthermore, Mr. Langston's report was admitted without objection at the time of his evidentiary deposition. Not only did respondent's counsel not have any objection to admission of Mr. Langston's report, but, likewise, never objected to Mr. Langston's opinion's based upon K.S.A. 44-519 during his testimony. For these reasons, the Appeals Board finds Mr. Langston's opinions to be competent and admissible and will be considered in determining the extent of permanent partial disability.

Although not required to do so, the method of determining work disability approved by the Kansas Supreme Court in the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) will be followed in this case. Applying the Hughes formula to average the 75 percent labor market loss with the 45 percent wage loss results in a work disability of 60 percent.

As noted above, K.S.A. 1991 Supp. 44-510e(a) sets out the definition of permanent partial general disability and the factors to be considered when computing the percentage of disability. The statute also states a presumption that a claimant whose post-injury wage is comparable to her pre-injury wage does not have a work disability. Specifically, it provides:

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant continued to be employed by respondent until November 1, 1993. Although it is not set out in the record as to specifically what claimant earned during the period from October 1991 through November 1, 1993, it appears that claimant would have earned a wage comparable to that which she was earning prior to her period of accidents, except for those weeks that she was off work due to her injury and receiving temporary total disability compensation. Therefore, the Appeals Board finds that the presumption should be applied for the period of time claimant continued to work for respondent. After November 1, 1993, when claimant was no longer working for respondent the record shows that claimant never earned a wage comparable to that which she was earning at the time of her injury. She worked only part-time jobs after November 1, 1993, earning between $4.25 and $4.85 per hour. Accordingly, the Appeals Board finds that the presumption of no work disability has been overcome for the period beginning November 2, 1993. Therefore, claimant is entitled to an award of permanent partial disability based upon her 20 percent functional impairment for the period beginning October 22, 1991, through November 1, 1993. Thereafter, beginning November 2, 1993, claimant is entitled to a permanent partial disability award based upon her work disability of 60 percent.

Respondent argues that claimant should be denied work disability based upon the public policy considerations announced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). However, the Appeals Board finds that the Foulk case is not applicable to the facts herein. Respondent has not established that it offered claimant a job which she could perform within her restrictions at a comparable wage. The bid process under which respondent's plant operates - whereby a worker may "bid" on regular duty

jobs at such time as they may become available and then, when they do bid, the worker may or may not win the bid for that job depending upon the respective seniority of the bidders - does not constitute an offer of employment. Furthermore, it was not established that any of the jobs, which were available during the period when claimant was eligible to bid, were jobs that the claimant could perform within her restrictions. Respondent never demonstrated that accommodations would be made to the regular duty jobs as may have been required to meet claimant's restrictions or, in fact, that there were regular duty jobs available which fit within those restrictions.

Hence, it has not been established that claimant refused to attempt a job which was within her restrictions or that she otherwise intentionally manipulated her employment status or earnings in order to take advantage of the workers compensation system. Respondent's reliance upon Foulk is misplaced. Although claimant could have perhaps done more to find a job with respondent that fit within her restrictions or perhaps to otherwise find full-time work which would have paid her more than the part-time jobs she has worked at since leaving respondent, we do not find the facts herein to be analogous to the facts in the Foulk case, nor do we find claimant's conduct rises to the level of being contrary to the public policy considerations announced in Foulk.

(3) Vocational Rehabilitation. The Special Administrative Law Judge denied vocational rehabilitation benefits to claimant at the expense of the employer based upon his determination that this claim had a post-July 1, 1993, date of accident. Since it has now been determined to be an "old act" case, vocational rehabilitation benefits can be awarded over the objection of the respondent. The finding by the Special Administrative Law Judge to the contrary should be reversed.

K.S.A. 1991 Supp. 44-510g(e)(1) provides in pertinent part:

> "If the employee has remained off work for 90 days . . . if approved rehabilitation services are not voluntarily furnished . . . by the employer, the director, . . . may refer the employee . . . for an assessment and for a report of the practicability of, need for, and kind of service, treatment, training or rehabilitation which is or may be necessary and appropriate to render such employee able to perform work in the open labor market and to earn comparable wages . . . ."

Claimant was off work more than 90 days and appears to meet the criteria for a vocational rehabilitation assessment and for consideration for payment of temporary total disability compensation during the period of assessment as provided for by K.S.A. 1991 Supp. 44-510g(e)(1). Furthermore, K.S.A. 1991 Supp. 44-510g(e)(1) provides that vocational rehabilitation services shall be provided where the employee is unable to perform work for the same employer at a comparable wage with or without accommodations or is unable to perform work in the open labor market or is unable to earn a comparable wage in the open labor market. Claimant's work history since leaving employment with respondent shows that she has never actually earned a wage comparable to that which she was earning at the time of her injury. Furthermore, the testimony of Mr. Langston is to the effect that claimant's current wage-earning ability is approximately $5.00 per hour or only 55 percent of her average weekly

wage. Mr. Langston's report which is Exhibit No. 2 to his deposition testimony states that in his opinion, claimant would benefit from re-education and training; although, he does not say whether such training would restore her to an ability to earn a comparable wage, nor does he specifically indicate what type of training would be appropriate.

Accordingly, the Appeals Board finds pursuant to K.S.A. 1991 Supp. 44-510g that claimant should be referred to a qualified vendor for a vocational assessment and report to the rehabilitation administrator as to the "practicability of, need for, and kind of service, treatment, training, or rehabilitation which is or may be necessary and appropriate to render such employee able to perform work in the open labor market and to earn comparable wages . . . ." K.S.A. 1991 Supp. 44-510g(e)(1).

(4) Temporary total disability compensation. Claimant is entitled to 21.86 weeks of total disability compensation at the rate of $204.88 per week for total of $4,478.68. This is the amount claimant acknowledged respondent paid at the regular hearing and claimant further acknowledged that this was the full amount of her claim. Accordingly, there has been no overpayment or underpayment of temporary total disability compensation.

(5) Average weekly wage. Claimant's Exhibit No. 1 to the regular hearing transcript contains a statement of claimant's gross average weekly wage exclusive of fringe benefits upon which both claimant and respondent agree. The point of contention concerns the cost of the health insurance benefits provided claimant by respondent and whether claimant is entitled to a determination of average weekly wage based upon a six-day work week pursuant to Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The agreed upon wage statement shows a gross average weekly wage of $300. Respondent disagrees with regular hearing Exhibit No. 1 to the extent it utilizes a six-day work week instead of a five-day work week and respondent contends claimant earned average overtime of $30.89 per week rather than the $40.25 reflected on Exhibit No. 1. Respondent contends claimant's base rate was $6.84 per hour which at eight hours per day computes to a daily rate of $54.72. Utilizing a five-day work week claimant's base weekly wage was $273.60. To this respondent adds $30.89 per week in overtime and $2.80 per week shift differential. This calculates to a gross average weekly wage $307.31 per week and a weekly compensation rate of $204.88.

Claimant argues for the same base daily rate of $54.72 but based upon a six-day work week this would result in a gross average base weekly wage of $328.32. Claimant would add to this figure an average weekly overtime of $4.25 and shift differential of $2.83 for a gross average weekly wage of $335.40.

In Tovar the Court of Appeals found that claimant worked most Saturdays. In this case, the evidence is to the contrary. In fact, it is not clear that claimant worked any Saturdays during the 26 weeks prior to her date of accident. For this reason, the Appeals Board finds Tovar does not apply and the claimant's average weekly wage should be determined pursuant to K.S.A. 1991 Supp. 44-511(b)(4) based upon a five-day work week. Therefore, the Appeals Board adopts the gross average weekly wage proposed by respondent of $307.31. Claimant's compensation rate would, therefore, be $204.88 until employment with respondent terminated and the claimant's fringe benefits terminated.

Claimant testified that she paid $10 to $12 per week for her medical, dental, vision and short-term disability insurance benefits. She estimated that respondent paid $60.00 per week for her fringe benefits. This testimony is uncontradicted in the record. Based thereon, after taking into consideration the cost of replacing this coverage, claimant is seeking $53.04 per week as fringe benefits to be added to her average weekly wage to account for the loss of fringe benefits beginning December 1, 1993. The Appeals Board finds that claimant has established $60 per week in fringe benefits but this figure was admittedly an estimate and since claimant is now only seeking $53.04 per week, the requested sum will be included in the calculation of claimant's gross average weekly wage beginning December 1, 1993. Adding $53.04 to the gross average weekly wage of $307.31 results in a gross average weekly wage of $360.35 and compensation rate of $204.25 effective December 1, 1993. As claimant was paid temporary total disability compensation through November 30, 1993, the effective date for the work disability award based upon the higher compensation rate will be December 1, 1993.

(6) Unauthorized medical expense. As this is an "old act" case, claimant is limited to an unauthorized medical allowance not to exceed $350. There is no prohibition against using the unauthorized medical allowance for examination and to obtain a report which contains a permanent partial disability rating. Accordingly, the unauthorized medical allowance may be applied towards to the $446 bill from Dr. Prostic. *See* K.S.A. 1991 Supp. 44-510(c).

(7) Future medical expense. Future medical treatment is granted only upon proper application to and approval by the Director. *See* Boucher v. Peerless Products, 21 Kan. App. 2d 977, 911 P.2d 198 (1996).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Douglas F. Martin dated August 30, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carla J. Alger-Combes, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred October 21, 1991, and based upon an average weekly wage of $307.31 for 21.86 weeks of temporary total disability compensation at the rate of $204.88 per week ,or $4,478.68; followed by 84.28 weeks of permanent partial disability compensation at the rate of $40.98 per week, or $3,453.79, for a 20% permanent partial disability based upon impairment of function; followed by 4.14 weeks of permanent partial disability compensation at the rate of $122.93 per week, or $508.93, based upon a 60 percent work disability; followed by 304.72 weeks of permanent partial disability compensation at the rate of $144.15 per week, or $43,925.39, for a 60 percent permanent partial general body disability, making a total award of $52,366.79.

As of March 31, 1997, there is due and owing claimant 21.86 weeks of temporary total disability compensation at the rate of $204.88, or $4,478.68; followed by 84.28 weeks of permanent partial disability compensation at the rate of $40.98 per week, or $43,453.79; followed by 4.14 weeks of permanent partial disability compensation at the rate of $122.93 per week, or $508.93; followed by 173.72 weeks of permanent partial disability compensation at

the increased rate of $144.15 per week, or $25,041.74, for a 60 percent general body disability for a total of $33,483.14, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $18,883.75 is to be paid for 131 weeks at the rate of $144.15 per week until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Tina M. Sabag, Dakota City, NE
Jeff K. Cooper, Topeka, KS
Douglas F. Martin, Special Administrative Law Judge
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director